(1)

Supreme Court, U.S.
FILED

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No. 99-

IN THE

Supreme Court of the United States

MRS. CAROLYN S. SMITH,

Petitioner,

v.

DR. CHARLES H. FAUCHEUX, ST. ANNE HOSPITAL AND HEALTH CENTERS and STATE OF LOUISIANA MEDICAL REVIEW PANEL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CAROLYN S. SMITH
Petitioner, Pro Se
237 Buford Street
Raceland, Louisiana 70394
(504) 537-7392

31 pp

QUESTIONS PRESENTED

I.

WHETHER *Pennoyer v. Neff*, requires that no person shall be deprived of Life, Liberty, Property or of any rights granted him by statute, unless the matter involved "first" shall have been adjudicated against him upon trial conducted according to established rules regulating judicial proceedings, and does it forbid condemnation without a hearing?

II.

WHETHER the United States Courts misconstrued the Due Process requirements of the Fifth and Fourteenth Amendments articulated in *Pennoyer v. Neff*?

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OPINIONS BELOW

The unpublished written opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A to this petition. The Order and Reasons of the United States District Court for the Eastern District of Louisiana is also an unpublished opinion and can be found at Appendix B. The per curiam opinion of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing appears at Appendix D.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its per curiam opinion on August 31, 1999 (App. A). Petitioner's timely motion for a rehearing was denied on September 30, 1999 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, section 2, of the United States Constitution:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; to Controversies between two or more States; — between a state and Citizens of another State; — between Citizens of different States; —

between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects. (2) In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have Original Jurisdiction. In all the other Cases before mentioned the Supreme Court shall have appellate Jurisdiction both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.

Article IV, of the United States Constitution:

Section 1. Full Faith and Credit shall be given in State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof. . . .

Section 3. (2) The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Article VI, of the United States Constitution:

> (2) This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding. . . .

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Louisiana, had jurisdiction pursuant to 28 U.S.C.A. § 1331; 28 U.S.C.A. § 547, but lacked subject matter jurisdiction pursuant to Article III, section 2, clause 2; 28 U.S.C.A. § 1251 and the Eleventh Amendment to the Constitution of the United States. (28 U.S.C.A. §§ 451 and 2403(a)(b)(c); 18 U.S.C.A. § 3006A).

Petitioner filed a fraud, malpractice, and negligence per se suit on February 20, 1998, in the United States District Court for the Eastern District of Louisiana, Civil and Criminal Action No. 98-0558, charging the respondents with fraud in violation of 18 U.S.C. § 1001, *et seq*. by committing the crime of making false statement concerning denial of constitutional rights, in fraudulent statement to deny and deprive petitioner of rights granted by the State and United States Constitution, and statutes; in violation of Article I, section 10, in intentionally refusing or failing to perform all duty lawfully required of them, as such officers and employers, and performed such duty in an unlawful manner; 42 U.S.C.A. §§ 1983, 1985, 1986, and 1988.

On February 20, 1998, petitioner filed a complaint, under civil and criminal statutes, Title 18 U.S.C.A. § 1001, *et seq.*; Article I, section 10, United States Constitution, Article VI, United States Constitution, in the United States District Court for the Eastern District of Louisiana.

On March 16, 1998, Judge Sarah S. Vance ordered that petitioner respond to questions and setting forth the basis for the Court's jurisdiction.

On March 20, 1998, St. Anne General Hospital was added as a party, and St. Anne Hospital Health was terminated.

On March 20, 1998, respondent St. Anne General Hospital filed a motion to dismiss for lack of subject matter jurisdiction and alternative motion for a more definite statement.

On March 25, 1998, petitioner filed answers to interrogatories of orders, setting forth the basis for the court's jurisdiction and a more definate statement.

On April 14, 1998 the case was reassigned to Judge Ivan L. Lemelle by Judge Sarah S. Vance.

On May 22, 1998, notice was filed that the case was reallotted to Magistrate Judge 2 by the Clerk of the Court.

On November 13, 1998 notice/order issued that the case is set before Judge Ivan L.R. Lemelle.

On December 14, 1998 call docket was set at 9:00, 12/2/98, ordered continued to be reset after ruling on respondents' motion to dismiss, by Judge Ivan L.R. Lemelle.

On December 14, 1998, petitioner filed a notice for constitutional questions in accordance with local rule 10.3 and 28 U.S.C.A. § 2403, certification to the United States Attorney General on the basis that the constitutionality of an Act of Congress was drawn into question.

On January 22, 1999, Order and Reasons issued granting motion of St. Anne General to dismiss for lack of subject matter jurisdiction and further ordered that respondents' motion to certain terms and for a more definite statement were dismissed as moot in view of the Court's ruling on motion to dismiss petitioner's claims as to all respondents.

On January 22, 1999 Judgment was rendered in favor of respondent Dr. Charles H. Faucheaux, St. Anne General Hospital and State of Louisiana Medical Review Panel and against petitioner, dismissing petitioner's claims with prejudice by Judge Ivan L. Lemelle. The due process was enhanced pursuant to 18 U.S.C.A. § 1501, *et seq.* The notice of appeal was filed on January 28, 1999.

On May 4, 1999, petitioner filed the briefs and record excerpts in the United States Court of Appeals for the Fifth Circuit.

On August 31, 1999 the Fifth Circuit issued its opinion denying petitioner appeal.

On September 9, 1999, petitioner filed a petition for rehearing in the Fifth Circuit Court of Appeals.

On September 30, 1999, the court order was entered denying petitioner's petition for rehearing. This petition for writ of certiorari ensues.

REASONS FOR GRANTING THE WRIT

I.

PENNOYER v. NEFF REQUIRES THAT NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY, PROPERTY OR OF ANY RIGHTS GRANTED HIM/HER BY STATUTE, UNLESS THE MATTER INVOLVED "FIRST" SHALL HAVE BEEN ADJUDICATED AGAINST HIM/HER UPON TRIAL CONDUCTED ACCORDING TO ESTABLISHED RULES REGULATING JUDICIAL PROCEEDING, AND IT FORBIDS CONDEMNATION WITHOUT A HEARING.

In *Smith v. Faucheux, et al.*, the United States District Court for the Eastern District of Louisiana denied petitioner's due process rights by misconstruing *Pennoyer v. Neff*, 95 U.S. 773. When all the excess verbiage is stripped away, the United States District Court denied the due process in *Smith v. Faucheux, et al.* The court stated that based on the analysis,

> the court finds that plaintiffs claims have no plausible foundation according to the statutes and federal law cited by plaintiff in her complaint and answer to interrogatories. IT IS FURTHER ORDERED that Defendant's Motion to Strike Certain Terms and Motion for a More Definite Statement (Rec. Doc. No. 4) are dismissed as MOOT in view of the Court's ruling on the above Motion to dismiss. Accordingly, plaintiffs claims as to all defendants are dismissed.

Respondents were accused of fraud, in violation of 18 U.S.C.A. § 1001; malpractice, and negligence per se under the Constitution and laws of the United States of America, including Articles IV and VI; and Acts of Congress as well as any and all other applicable laws.

Thus, it appears in the other cases that evidence of respondents conduct of previous crimes would be admissible; Seventeenth Judicial Court LA., Case No. 71972.

Therefore, a court is without authority to adjudicate a matter over which it has no jurisdiction, *Noble v. Union River Logging Railroad Co.*, 147 U.S. 165, 13 S. Ct. 271. The State is a party, under Article III, section 2, cl. 2.

Accordingly, the parties have been properly served with process, and the parties have been denied the right to a preliminary or full hearing and a trial by jury. *Morgan v. United States*, 304 U.S. 1, 58 S. Ct. 773, 776, 777.

Thus, under the Fifth Amendment, the petitioner would be able to proceed under 28 U.S.C.A. §§ 547, 2403, and 18 U.S.C. § 3006A of the Criminal Justice Act; substitution, citing, *United States v. Grismore C.A. Colo.*, 546 F.2d 844, 847, Sixth and Fourteenth Amendments under equal protection.

The only rational explanation for the courts decision which did not rely exclusively on the Fifth and Fourteenth Amendments to the United States Constitution, is that the United States District Court for the Eastern District of Louisiana has interpreted and adopted a single view of the due process of law.

Such an approach does not require a party to be heard by testimony or otherwise have the right of controverting the other parties evidence by proof. Such a view has been steadfastly rejected by the District Court.

Finally, the ill sought to be avoided by a preliminary hearing was to protect the parties from the burden of multiple trials. (Fifth Amendment).

In *Smith*, however the courts reversed petitioner's civil rights, by denying her the right to a preliminary or full hearing under the Fifth and Fourteenth Amendments.

Thus, the supposed ill that the Fifth and Fourteenth Amendments was meant to correct is not present in this case.

II.

THE UNITED STATES COURTS MISCONSTRUED THE DUE PROCESS OF THE FIFTH AND FOURTEENTH AMENDMENTS IN *PENNOYER v. NEFF.*

The court decision in *Smith v. Faucheux, et al.*, signifies a radical departure from the court in interpreting the due process of the Fifth and Fourteenth amendments to the United States Constitution. Petitioner submits that the decision of Fifth and Fourteenth Amendments is supported by precedent and workable in practice and should not be overruled.

The due process provision of the Fourteenth Amendment states:

> Section 1. . . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The basic test for determining the due process of a person is important since it requires that the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of fact of liability be conclusively presumed against her, this is not due process of law.

The basic test for determining whether a person charged with a crime should be held for trial is a preliminary hearing to establish evidence that the respondent committed it. (Fed. R. Crim. P. 5.1, Fed. R. Civil P. 12(d), the proofs are the complaint, information, affidavit, and certification 2403).

The Court decision in determining the due process of law of petitioner involves conduct that violates distinct statutory provisions, 42 U.S.C.A. §§ 1983, 1985, 1986, 1987, 1988, *et seq.* The essence of due process of law is that no person shall be deprived of life, liberty, property or of any rights granted her by statute, unless the matter involved first shall have been adjudicated against him in a trial conducted according to established rules regulating judicial proceedings. Thus, in the complaint and information, proof of the fact that a crime has been committed and that the

respondents have deprived petitioner of her rights were submitted to the Court. (Fed. R. Crim. P. 54).

Finally, although the court has adopted a single view of the due process of law the effect of the Fifth and Fourteenth Amendments is not the same.

CONCLUSION

For the reasons and argument presented, petitioner, Mrs. Carolyn S. Smith, requests that her Petition for a Writ of Certiorari be granted.

Respectfully submitted,

CAROLYN S. SMITH
Petitioner, Pro Se
237 Buford Street
Raceland, Louisiana 70394
(504) 537-7392

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED AUGUST 31, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30115
Summary Calendar

CAROLYN J. SMITH,

Plaintiff-Appellant,

versus

CHARLES H. FAUCHEUX, Doctor; STATE OF LOUISIANA MEDICAL REVIEW PANEL; ST. ANNE GENERAL HOSPITAL,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 98-CV-558-B

Before JOLLY, JONES and BENAVIDES, Circuit Judges.

PER CURIAM:*

Carolyn J. Smith appeals the district court's dismissal of her case for lack of subject matter jurisdiction. She alleges

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

that the district court erred by denying her "due process of law rights" and departing from the Federal Rules of Civil Procedure and criminal procedure guidelines.

The record in this case reveals that both Ms. Smith and all of the defendants named are domiciled in the state of Louisiana. As such, subject matter jurisdiction cannot be based on diversity of citizenship. *See* 28 U.S.C. § 1332; *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829, 109 S.Ct. 2218, 2221 (1989). Ms. Smith's attempts to establish some sort of federal question in her brief are devoid of merit; essentially, her claims boil down to a simple medical malpractice case. *See* 28 U.S.C. § 1331. Because Ms. Smith has established neither diversity of citizenship nor a federal claim, the district court did not err in dismissing the case as to all defendants.

AFFIRMED.

APPENDIX B — ORDER AND REASONS AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED AND FILED JANUARY 22, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 98-558

SECTION: B(2)

MRS. CAROLYN J. SMITH

VERSUS

DR. CHARLES H. FAUCHEAUX, ET AL.

Order and Reasons

IT IS HEREBY ORDERED that defendant St. Anne General Hospital's Motion to Dismiss (Rec. Doc. No. 4) is **GRANTED.**

Pro se Plaintiff, Carolyn Smith, lives in Lafourche Parish, Louisiana. Defendants are also domiciled in Louisiana or have their principle place of business in Louisiana. Plaintiff alleges that on or about July 28, 1993 through February 21, 1994, the actions of Dr. Charles Faucheux caused damage to her uterus, placenta and child. She claims that because her ultra sound, genetic and F.I.S.H. tests were normal, the condition of her child must be due to her torn placenta.

Appendix B

Plaintiff's claims against defendants are for "civil and criminal actions of fraud, malpractice and negligence per se." Defendant St. Anne General Hospital seeks dismissal of the action and/or the striking of certain inflammatory words from the body and text of the complaint, or, alternatively, for a more definite statement of the case.

Defendant's Contentions

The Hospital brings this motion for dismissal under Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction. It contends that subject matter jurisdiction can not be based on 28 U.S.C. §1332, diversity of citizenship, because plaintiff is a domiciliary of Louisiana and the Hospital is a political subdivision of Lafourche Parish, Louisiana, with its principle place of business in Lafourche Parish, Louisiana.

The Hospital also contends that subject matter jurisdiction cannot be based on 28 U.S.C. §1331 because the complaint contains no federal question cause of action. It contends that plaintiff's citations to federal statutes are merely scattershot. They assert that, at best, plaintiff's complaint alleges medical malpractice under Louisiana law. This is based on four reasons.

First, The Hospital contends that plaintiff does not have standing to bring "criminal actions" under federal law, and neither "malpractice" nor "negligence per se" is a federal crime. Second, it contends that there is no claim for "fraud" because there is only a general allegation of fraud, not a particular claim, as required by Fed. R. Civ. P. 9(b). It lists plaintiff's generalities and demonstrates her lack of

particularity. (Defendant's Motion, P. 4-5). The Hospital further contends that, even if the fraud alleged was particular, which it is not, then it is still insufficient due to the failure of plaintiff to plead with specificity as to each defendant. Allegations of fraud may be dismissed where each defendants' role is not particularly alleged. *Rhone v. Entergy North, Inc.*, 790 F. Supp. 353, 361 (D. Mass. 1991).

Third, the Hospital contends that plaintiff has failed to identify any conduct of any defendant giving rise to a claim under the Constitutional provisions cited, Article 1, section 10; Article 4; and Article 6. Lastly, plaintiff has not identified any conduct by any defendant that gives rise to a claim under 18 U.S.C. §1001, and even if she did, it is a federal criminal statute that does not create a civil cause of action for private litigants.

The Hospital further moves striking from the complaint the vague references to an alleged "criminal action" or "fraud, malpractice, and negligence per se" from the complaint because the references are immaterial, inflammatory, and lack any basis in law or fact. It asserts these references are "impertinent" or "scandalous" under Fed. R. Civ. P. 12(f). It cites *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 664-665 (7th Cir. 1992) (court struck allegations that a party intentionally caused a salmonella outbreak at a dairy because it was based on rumors and devoid of facts) and *Nault's Automobile Sales, Inc. v. American Honda Motor Co., Acura Automobile Div.*, 148 F.R.D. 25 (D.N.H. 1993) (court struck allegations of discovery abuses, subornation of perjury, and perjury as without basis and scandalous).

Appendix B

Plaintiff's Contentions

Plaintiff has not responded to this motion. She previously filed a response to an order by Judge Vance (Rec. Doc. No. 3), which contained questions regarding the defendants' addresses, the location of the event(s) at issue, and the statutes under which plaintiff claims to be proceeding or under which the defendants are allegedly liable for her alleged injuries. The addresses that she lists for all parties and for the location of the events are all in Louisiana (she provides specific addresses). Plaintiff contends that her claims are based on 18 U.S.C.A. §1001 for "the crime of making false statement concerning denial of constitutional rights, of fraudulent statements to deny and deprive [her] of rights," and on Article 1, Section 10; Article 4, and Article 6 of the U.S. Constitution in compliance with 28 U.S.C.A. §1331 and for "intentionally refusing or failing to perform all duty lawfully required of them, as such officer or employer, and performed such duty in an unlawful manner."

Law & Discussion

If just one defendant is a citizen of the same state as the plaintiff, subject matter jurisdiction cannot be based on diversity of citizenship. 28 U.S.C. §1332. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829, 109 S.Ct. 2218, 2221 (1989). Plaintiff and defendants are all citizens of Louisiana. Therefore, this court lacks diversity jurisdiction.

Furthermore, plaintiff cannot rely on federal question jurisdiction under 28 U.S.C. §1331, despite her invocation of several Constitutional provisions and various federal

statutes. Plaintiff cites Article 1, Section 10; Article 4; and Article 6 of the United States Constitution. Article 1, Section 10 discusses sovereign powers which states are prohibited from exercising, such as entering into treaties, granting letters of marque and reprisal and coining money. U.S.C.A. Const. Art. 1, Section 10. Article 4 lays out states' reciprocal relationships with each other and with the United States. This article includes the full faith and credit clause and the privileges and immunities clause. U.S.C.A. Const. Art. 4. Article 6 covers the validation of debts, the supremacy clause, oaths of office and religious tests for federal officials. U.S.C.A. Const. Art. 6. Plaintiff's claims here could not trigger the application of any of the above noted constitutional provisions. Plaintiff also cites Title 42 U.S.C.A. §1985 et seq. as another basis for her claims. The latter statute creates a cause of action for victims of conspiracies to interfere with their civil rights by 1) preventing a government officer from performing his duties; 2) by obstructing justice, intimidating parties, witnesses or jurors; or 3) depriving persons of rights and privileges or equal protection of the law. Section 1986 of the latter Title creates a cause of action against persons who, with knowledge of a §1985 conspiracy and the power to prevent or aid in the prevention of the commission of the conspired act, neglected or refused to prevent it. Plaintiff's conspiracy claims are not supported with facts or law. Conclusory conspiracy claims must fail. *Marts v. Hines*, 68 F.3d 134, 136 (5th Cir. 1995); *Wesley v. Don Stein Buick, Inc.*, 985 F.Supp. 1288, 1299 (D.Kan. 1997).

Lastly, plaintiff cites Title 18 U.S.C. §1001. Section 1001 is a criminal statute that creates a federal crime for

concealing a material fact from or making false or fraudulent statements to any department or agency of the United States. This statute is designed to prevent deceptive practices aimed at frustrating or impeding legitimate functions of government departments or agencies of the United States. *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), *rehearing denied*, 716 F.2d 914. Even if the facts fit, which they do not, plaintiff has no standing to bring a suit under 18 U.S.C. §1001 because it does not provide a private right of action. *Williams v. McCausland*, 791 F. Supp 992, 1001 (S.D.N.Y. 1992). The right to pursue such an action rests with federal law enforcement officials (i.e., United States Attorney General and United States Attorneys).

IT IS FURTHER ORDERED that this action be **DISMISSED** for lack of subject matter jurisdiction as to all other defendants, Dr. Charles Faucheaux and the State of Louisiana Medical Review Panel, on the Court's own motion. Fed. R. Civ. P. 12(h)(3). Whenever a doubt arises as to the existence of subject matter jurisdiction, a court is obliged to inquire sua sponte whether such jurisdiction exists. *Marathon Oil Company v. A.G. Ruhrgas*, 145 F.3d 211, 217 (5th Cir. 1998); *J.A.R., Inc. v. M/V Lady Lucille*, 963 F.2d 96, 98 (5th Cir. 1992). Dismissal for lack of subject matter jurisdiction is only proper in the case of a frivolous or insubstantial claim, i.e. a claim which has no plausible foundation. . . ." *Bell v. Health-Mor, Inc.*, 549 F.2d 342, 344 (5th Cir. 1977). Based on the above analysis, this Court finds that plaintiff's claims have no plausible foundation according to the statutes and federal law cited by plaintiff in her complaint and answer to interrogatories (Rec. Doc. No. 5).

Appendix B

IT IS FURTHER ORDERED that Defendant's Motion to Strike Certain Terms and Motion for a More Definite Statement (Rec. Doc. No. 4) are dismissed as **MOOT** in view of the Court's ruling on the above motion to dismiss.

Accordingly, plaintiff's claims as to all defendants are dismissed.

New Orleans, Louisiana this 22nd day of January, 1999.

s/ [illegible]
UNITED STATES DISTRICT
JUDGE

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 98-558

SECTION: B(2)

MRS. CAROLYN SMITH

VERSUS

DR. CHARLES H. FAUCHEAUX, ET AL.

JUDGMENT

For the reasons this date separately assigned and having dismissed plaintiff's claims for lack of subject matter jurisdiction, accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants Dr. Charles H. Faucheaux, St. Anne General Hospital and State of Louisiana Medical Review Panel and against plaintiff Carolyn J. Smith, dismissing plaintiff's claims with prejudice.

New Orleans, Louisiana this 22nd day of January, 1999.

s/ [illegible]
UNITED STATES DISTRICT
JUDGE

APPENDIX C — OPINION OF THE STATE OF LOUISIANA, PATIENTS COMPENSATION FUND, MEDICAL REVIEW PANEL DATED OCTOBER 6, 1997

STATE OF LOUISIANA
PATIENTS COMPENSATION FUND
MEDICAL REVIEW PANEL

PCF file: 95-1011

THOMAS AND CAROLYN SMITH, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR SON, T. J. SMITH

VERSUS

DR. CHARLES H. FAUCHEUX, AND ST. ANNE HOSPITAL & HEALTH CENTERS

OPINION

The Medical Review Panel, comprised of the three undersigned physicians in the above captioned matter, after due proceedings had, proper instructions regarding the duty of care, and after review of all the evidence presented, hereby renders the following findings:

The evidence does not support the conclusion that the defendants, Dr. Charles H. Faucheux, or St. Anne Hospital failed to comply with the applicable standard of care as charged in the complaint in their treatment of Carolyn Smith and T. J. Smith.

Appendix C

REASONS

RE: DR. CHARLES H. FAUCHEUX:

We are confident that the diagnosis is microcephaly 2° Lissencephaly and with that diagnosis we can say very confidently that there is nothing that the obstetrician can do to prevent this disorder, and thus we find that Dr. Faucheux did not cause this condition and could not diagnosis it. It is a very rare disorder that could not have been prevented by the obstetrician.

RE: ST. ANNE HOSPITAL AND HEALTH CENTER:

The hospital did not deviate from the standard of care for the same reasons as stated above.

Opinion rendered on this 6th day of October, 1997.

s/ Jack Wise
JACK WISE,
PANEL CHAIRMAN

s/ Philip N. Neal
PHILIP N. NEAL, M.D.

s/ John R. Landry
JOHN R. LANDRY, M.D.

s/ Alfred G. Robichaux
ALFRED G. ROBICHAUX, III, M.D.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 30, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30115

CAROLYN J SMITH

Plaintiff – Appellant

v.

CHARLES H. FAUCHEUX, Doctor; LOUISIANA STATE OF MEDICAL REVIEW PANEL; ST ANNE GENERAL HOSPITAL

Defendants – Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

Before JOLLY, JONES and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is Denied.

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge

Supreme Court, U.S.
FILED
DEC 30 1999
CLERK

(2)

No. 99-965

In The

Supreme Court of the United States

MRS. CAROLYN S. SMITH,

Petitioner,

vs.

DR. CHARLES H. FAUCHEAUX, ST. ANNE HOSPITAL and HEALTH CENTERS, and STATE OF LOUISIANA MEDICAL REVIEW PANEL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT ST. ANNE GENERAL HOSPITAL'S BRIEF IN OPPOSITION

P. CHAUVIN WILKINSON, JR.
Counsel of Record
WATSON, BLANCHE, WILSON & POSNER
505 North Blvd.
Post Office Box 2995
Baton Rouge, Louisiana 70821-2995
Telephone: (225) 387-5511
Fax: (225) 387-5972

Counsel for Respondent, St. Anne General Hospital

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether Carolyn Smith's Petition For Writ Of Certiorari should be granted.

2. Whether the United States Court of Appeal for the Fifth Circuit properly affirmed the United States District Court for the Eastern District of Louisiana in granting St. Anne General Hospital's Motion to Dismiss for lack of subject matter jurisdiction.

LIST OF ALL PARTIES TO THE PROCEEDING

1. Mrs. Carolyn S. Smith
   237 Buford Street
   Raceland, Louisiana 70394
   Telephone: (504) 537-7392
   In Proper Person

2. P. Chauvin Wilkinson, Jr.
   WATSON, BLANCHE, WILSON & POSNER
   505 North Boulevard
   Post Office Box 2995
   Baton Rouge, Louisiana 70821-2995
   Telephone: (225) 387-5511
   Attorneys for:
   St. Anne General Hospital

3. Joseph A. Reilly, Jr.
   HENDERSON, HANEMAN & MORRIS
   300 Lafayette Street
   Houma, Louisiana 70360
   Telephone: (504) 868-2081
   Attorneys for:
   Dr. Charles H. Faucheaux

4. Jack B. Wise
   WISE & WISE
   206 West 7th Street
   Post Office Box 908
   Thibodaux, Louisiana 70302
   Telephone: (504) 446-0526
   Medical Review Panel Attorney Chairman

DISCLOSURE STATEMENT

St. Anne General Hospital is a political subdivision of LaFourche Parish, Louisiana, and its principal place of business is Raceland, LaFourche Parish, Louisiana.

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STATEMENT OF THE CASE

On August 16, 1995, Thomas and Carolyn Smith filed a medical malpractice claim before the Patients' Compensation Fund through her then counsel of record. That Claim was asserted pursuant to the Louisiana Medical Malpractice Act, La. R.S. 40:1299.41, *et seq.*, and was styled "THOMAS AND CAROLYN SMITH, ET AL VERSUS DR. CHARLES H. FAUCHEAUX AND ST. ANNE GENERAL HOSPITAL", PCF Number: 95-111. That Claim alleged medical malpractice in connection with Carolyn Smith's pregnancy and pre-natal care in 1993 through February 1994, and in delivery and post-natal care related to the birth of the minor child T.J. Smith. The Patients' Compensation Fund appointed Jack Wise as Medical Review Panel Attorney Chairman. In due course, the Medical Review Panel was formed, and the Medical Review Panel met pursuant to notice on October 6, 1997. On that date, the Medical Review Panel unanimously ruled that the evidence does not support the conclusion that Dr. Charles H. Faucheaux or St. Anne General Hospital failed to comply with the applicable standard of care as charged in the Complaint in their treatment of Carolyn Smith and T.J. Smith.

On or about February 20, 1998, Smith filed a pleading before the United States District Court For The Eastern District of Louisiana entitled "Malpractice, Negligence Per Se, and Fraud". Smith claims she "sustained serious and grievous injury to her uterus, placenta, and child". (R 67). The pleading vaguely refers to "their false statement of a material fact" and the defendants' "knowledge" that "the statement was untrue". Although mostly incomprehensible, the pleading seems to be a garden variety

state law medical malpractice claim, which she attempts to transform into a federal "civil and criminal action".

On or about March 19, 1998, St. Anne General Hospital filed its Motion To Dismiss And Alternative Motion For More Definite Statement. (R 43). St. Anne General Hospital asserted that the United States District Court does not have subject matter jurisdiction because there is no diversity of citizenship for purposes of 28 USC 1332 and because there is no federal question for purposes of 28 USC 1331. Alternatively, St. Anne General Hospital moved that the Court strike from the Complaint vague references to "criminal action" and alleged "fraud, malpractice, and negligence per se", or in the further alternative moved for a more definite statement because the Complaint is so ambiguous, vague, and confusing that St. Anne General Hospital cannot reasonably frame a responsive pleading, and that the Complaint does not allege with particularity the circumstances constituting supposed "fraud".

Although not received by St. Anne General Hospital until after it had filed its Motion To Dismiss, on March 13, 1998 the District Judge *sua sponte* ordered Smith to file a written response setting forth the basis of the Court's jurisdiction, including the following information:

- The specific address of each defendant;
- A clear statement setting forth the particular statute under which the plaintiff claims to proceed;
- A clear statement setting forth the specific location where the events alleged occurred; (R 60).

On March 25, 1998, Smith filed her "Answers To Interrogatories Of Order" and an "Affidavit". (R 34, 37). There, Smith repeated the same constitutional and statutory provisions cited earlier in her pleadings, adding a reference to 42 USC 1985 and 1986. She also added that her "power of attorney for the church and diversity matters has been given to Reverend Preston L. Scarbrough, House of Prayer Tabernacle (BC) on August 22, 1989". (R 37). Those documents apparently were the only "response" to St. Anne General Hospital's Motion To Dismiss And Alternative Motion For More Definite Statement.

On January 22, 1999, the District Court granted St. Anne General Hospital's Motion To Dismiss. The District Court also dismissed this action for lack of subject matter jurisdiction *sua sponte* as to all other defendants. The District Court dismissed St. Anne General Hospital's Motion To Strike and Motion For More Definite Statement as moot in view of the Court's ruling on the Motion To Dismiss. The District Court dismissed all the plaintiff's claims as to all defendants. (R 8, 10).

In its thorough Reasons, the District Court noted that subject matter jurisdiction cannot possibly be based upon diversity of citizenship nor on federal question. Both Smith and St. Anne General Hospital are domiciliaries of LaFourche Parish, Louisiana. The District Court correctly noted that Smith cannot rely on federal question jurisdiction by invoking various constitutional provisions and federal statutes. The cited Constitutional provisions have nothing to do with this case. Vague and conclusory references to "conspiracy" or "fraud" are not supported. The plaintiff has no standing to bring a suit under 18 USC

1001 because it does not provide a private right of action. (R 10).

On August 31, 1999, the United States Court of Appeal for the Fifth Circuit affirmed the United States District Court for the Eastern District of Louisiana. The Court of Appeal noted that both Mrs. Smith and all the defendants are domiciled in the State of Louisiana, and subject matter jurisdiction cannot be based upon diversity of citizenship. Further, the Court of Appeal recognized that Smith's attempt to establish some sort of "federal question" is devoid of merit, and that essentially her claim boils down to a simple medical malpractice case. The Court of Appeal held that because Smith has established neither diversity of the citizenship nor a federal claim, the District Court did not err in dismissing the claim as to all defendants.

On September 30, 1999, the United States Court of Appeal for the Fifth Circuit denied Smith's Petition For Rehearing.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. The Petition For Writ of Certiorari should be denied because it does not meet the applicable standard.

Smith apparently presents her Petition For Writ Of Certiorari pursuant to 28 USC 1254. The decision by the United States Court of Appeal for the Fifth Circuit is *not* in conflict with the decision of another United States Court of Appeal, and the United States Court of Appeal

for the Fifth Circuit has *not* decided an important federal question in a way that conflicts with the decision of a state court of last resort. The United States Court of Appeal for the Fifth Circuit has *not* so far departed from the accepted and usual course of judicial proceedings so as to call for the exercise of the supervisory power of the United States Supreme Court. The United States Court of Appeal for the Fifth Circuit has *not* decided an important question of federal law that has not been, and need not be, settled by the United States Supreme Court. Finally, the United States Court of Appeal for the Fifth Circuit has *not* decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court. (Rules of the Supreme Court of the United States, Rule 10).

The Louisiana Medical Malpractice Act, La. R.S. 40:1229.41, *et seq.* procedurally controls the manner in which a medical malpractice claim is filed and handled before the claimant files suit in District Court. Among its other provisions, the Louisiana Medical Malpractice Act requires that the Claim be first presented to a Medical Review Panel, which must review the evidence and issue an expert opinion concerning whether the evidence indicates that the health care provider failed to comply with the applicable standard of care as charged in the Complaint, and whether the health care provider caused the injuries or losses alleged in the Complaint. The manner in which the Medical Review Panel reviewed Smith's claim and the Medical Review Panel's unanimous Opinion *conformed perfectly* to the Louisiana Medical Malpractice Act and all other applicable law.

Seoane v. Ortho Pharmaceuticals, Inc., 660 F.2d 146 (5th Cir. 1981) specifically reviewed the constitutionality of the Louisiana Medical Malpractice Act, La. R.S. 40:1229.41, *et seq.*, and affirmed the District Court's judgment that those administrative procedures which are applicable in a diversity case did not violate Due Process nor Equal Protection. *Seoane* held that the Equal Protection challenge at issue must be measured by the rational basis standard, and held that nothing suggested that the statute violated the Equal Protection clause. Further, the Medical Malpractice Act does not restrict the exercise of a fundamental right, and the Court of Appeal limited its review to resolving whether the legislation is arbitrary – in other words whether the legislation is reasonable in light of a legitimate governmental goal. *Seoane* recognized that the:

> "The apparent purpose of the medical review panel is to screen groundless complaints, assist in the evaluation of legitimate claims, and encourage settlements. Such legislative design is reasonable and seemingly sound. It readily withstands the due process challenge. The limited Court access restriction, posed by this statute, does not constitute a denial of due process." *Seoane*, 660 F.2d at 151.

Neither Smith's Petition For Writ Of Certiorari nor the evidence reviewed by the Court's below contain any support whatsoever that the United States Supreme Court should grant Smith's Petition For Writ Of Certiorari.

II. The United States Court of Appeal for the Fifth Circuit properly affirmed the United States District Court for the Eastern District of Louisiana in granting St. Anne General Hospital's Motion to Dismiss for lack of subject matter jurisdiction.

Every Federal Court at all levels has jurisdiction to determine its own jurisdiction, and has appellate jurisdiction to review, reverse, modify, or affirm the lower Court's decision. *Screven County v. Brier Creek Hunting and Fishing Club*, 202 F.2d 369 (5th Cir. 1953). Whenever doubt arises as to the existence of subject matter jurisdiction, a Federal Court is obliged to inquire *sua sponte* whether jurisdiction exists. *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 217 (5th Cir. 1998); *J.A.R., Inc. v. M/V Lady Lucille*, 963 F.2d 96, 98 (5th Cir. 1992). A Federal appellate court may review subject matter jurisdiction even if not raised below, *Smith v. Grimm*, 534 F.2d 1346 (5th Cir. 1976).

A District Court may decide a Motion To Dismiss For Lack of Subject Matter Jurisdiction on one of three bases: the Complaint alone; the Complaint supplemented by undisputed facts evidenced in the record; or the Complaint supplemented by undisputed facts evidenced in the record; or the Complaint supplemented by undisputed facts plus the Court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *Ynclan v. Department of Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991). When the basis of the dismissal is evident from the record, the Court of Appeal's review is limited to determining whether the District Court's application of the law is correct and

whether the facts are undisputed. *Ynclan v. Department of Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991).

When reviewing a Fed. R. Civ. P. 12(b)(1) dismissal for the lack of subject matter jurisdiction, the Court will take the factual allegations as true for purposes of the appeal and review the case de novo under the same standard used by the District Court: a claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 742 (1976); *Benton v. U.S.*, 960 F.2d 19, 21 (5th Cir. 1992).

Smith who describes herself as domiciled in LaFourche Parish, Louisiana seeks to transform what appears to be a garden variety state law medical malpractice claim into a federal "civil and criminal action" by referencing certain sections of the U.S. Constitution, 18 USC 1001, and other federal statutes. However, scattershot references to federal statutes do not confer subject matter jurisdiction.

St. Anne General Hospital attached to its Motion To Dismiss the Affidavit of Milton D. Bourgeois, Jr., its Chief Executive Officer. (R 47). Mr. Bourgeois testified by Affidavit that St. Anne General Hospital is a political subdivision of LaFourche Parish, and its principal place of business is Raceland, LaFourche Parish, Louisiana. Because Smith specifically alleges that she is domiciled in LaFourche Parish, Louisiana, subject matter jurisdiction cannot possibly be based upon diversity of citizenship.

The District Court is correct in holding that there is no diversity of citizenship for purposes of 28 USC 1332.

The plaintiff and all defendants are citizens of Louisiana. If just one defendant is a citizen of the same state as the plaintiff, subject matter jurisdiction cannot be based on diversity of citizenship. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829 (1989). (R 14).

Likewise, jurisdiction cannot possibly be based upon federal question pursuant to 28 USC 1331. The Complaint alludes to claimed or supposed medical malpractice between July 28, 1993 and February 21, 1994, and obliquely acknowledges the Complaint *already* has been *presented to the Medical Review Panel.* It is understatement that the Complaint is vague and confusing, and fails to set out with any clarity the facts upon which any Claim is based.

Smith's Claim cannot possibly arise under United States Constitution – Article 1, Section 10; Article 4; or Article 6. Even the most cursory review of those provisions discloses absolutely no basis for Smith to claim that her cause of action arises there. For example, the Complaint has nothing to do with a State entering into a treaty or alliance, nothing to do with granting letters of Marque, nothing to do with coining money, nothing to do with ex-post facto laws or laws impairing the obligation of contracts, nothing to do with Full Faith and Credit, nothing to do with privileges and immunities of citizens in the several states, nothing to do with persons charged in any state with treason or persons held to service or labor in one state escaping into another, nothing to do with debts contracted or engagements entered into before the adoption of the constitution, and nothing to do with Senators and Representatives being bound by oath or affirmation to support the Constitution.

Secondly, federal question jurisdiction cannot possibly be based upon 18 USC 1001. That provision declares that, in matters *within the jurisdiction of any department or agency of the United States*, a person who knowingly or willfully falsifies or conceals a material fact or makes a false or fraudulent statement shall be punished as specified. Smith clearly lacks standing to bring a "criminal action" under federal law, and neither alleged "malpractice" nor alleged "negligence per se" constitutes a federal crime. Indeed, the very purpose of 18 USC 1001 is to prevent deceptive practices aimed at frustrating or impeding legitimate functions of *government departments or agencies. U.S. v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), *rehearing denied*, 716 F.2d 914 (11th Cir. 1983). 28 USC 1001 does *not* provide a private right action. *Williams v. McCausland*, 751 F.Supp. 272 (S.D.N.Y. 1992). Consequently, and regardless of the "merits" of her Claim, Smith cannot possibly state a claim under that provision.

Likewise, there is absolutely no basis to allege that subject matter jurisdiction arises under 42 USC 1985, *et seq*. There is no allegation whatever that even comes close to sufficiently supporting a conspiracy to interfere with civil rights.

Further, Smith clearly has not alleged fraud with the particularity required by Fed. R. Civ. P. 9(b). Smith alleges in Paragraph V that "facts" were presented to the Medical Review Panel, that some undefined "they" had all the test results, "their recommendation constitutes malpractice . . . their false statement of a material fact", and "having knowledge on the part of the defendants that the statement was untrue". (Complaint, Paragraph V). St. Anne General Hospital has no idea to whom Smith is

referring, no idea to what "false statement" she is referring, no idea to what "knowledge" that a statement supposedly was untrue was had by whom, and no idea what facts are "material". In short, Paragraph V of the Complaint does not come close to the particularity requirement for an allegation of fraud. Allegations of fraud may be dismissed where each defendant's role is not particularly alleged. *Rhone v. Energy North, Inc.*, 790 F.Supp. 353 (D. Mass 1991).

The District Court is also correct in holding that Smith cannot rely upon federal question jurisdiction under 28 USC 1331, despite her invocation of several constitutional provisions and various federal statutes. (R 14). As the District Court points out, the provisions of the U.S. Constitution which Smith cites have absolutely nothing to do with Smith's claims. (R 15). 42 USC 1985, *et seq.*, does not provide a basis for federal question jurisdiction. The District Court correctly points out that 42 USC 1985, *et seq.*, creates a cause of action for victims of a conspiracy to interfere with their civil rights by:

- Preventing a government officer from performing his duties;
- By obstructing justice, intimidating parties, witnesses, jurors; or
- Depriving persons of rights and privileges or equal protection under the law. (R 15).

42 USC 1986 creates a cause of action against persons who, with knowledge of a 42 USC 1985 conspiracy with the power to prevent or aid in the prevention of the commission of the conspired act, neglected or refused to prevent it. The District Court is absolutely correct in

holding that the "conspiracy" claims are not supported with facts or law, and must fail. (R 15). *Marts v. Hines*, 68 F.3d 134, 136 (5th Cir. 1995); *Wesley v. Don Stein Buick, Inc.*, 985 F.Supp. 1288, 1299 (D. Kan. 1997).

Likewise, the District Court is correct in pointing out that 18 USC 1001 is a criminal statute that creates a federal crime for concealing a material fact from, or making a false or fraudulent statement to, any department or agency of the United States. That provision is designed to prevent deceptive practices aimed at frustrating or impeding legitimate functions of government departments or agencies. (R 15). The District Court correctly holds that even if the facts fit, *which the District Court specifically holds they do not*, Smith has no standing to bring a suit under 18 USC 1001 because that provision does not support a private right of action. (R 16). The right to pursue such an action rests exclusively with federal law enforcement officials.

The District Court also correctly – *sua sponte* pursuant to Fed. R. Civ. P. 12(h)(3) – dismissed the Petition for lack of subject matter jurisdiction as to all other defendants, specifically holding that:

> "The plaintiff's claims have no plausible foundation according to the statutes in federal law cited by the plaintiff in her Complaint and Answers To Interrogatories." (Order and Reasons, page 8). Citing *Bell v. Health-Mor, Inc.*, 549 F.2d 342, 344 (5th Cir. 1977). (R 16).

The United States Court of Appeal of the Fifth Circuit correctly affirmed the United States District Court For The Eastern District of Louisiana. The Court of Appeal correctly noted that because both Smith and all of the

defendants were domiciled in the State of Louisiana, subject matter jurisdiction cannot be based upon diversity of citizenship. Further, the Court of Appeal was correct in noting that Smith's attempt to establish some sort of federal question is devoid of merit, and that her Claim is a simple medical malpractice case. No legitimate federal question is involved.

CONCLUSION

For the above reasons, the Petition For Writ Of Certiorari should be denied by this Court.

Respectfully submitted this 30th day of December, 1999.

WATSON, BLANCHE, WILSON
& POSNER
595 North Blvd., P. O. Box 2995
Baton Rouge, Louisiana
70821-2995
Telephone: (225) 387-5511
Fax: (225) 387-5972

Attorneys for:
St. Anne General Hospital